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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1147

EDGAR W. MAXWELL, as Tax Assessor of Palm Beach County, Florida, *Appellant*

v.

THE GOOD SAMARITAN HOSPITAL ASSOCIATION, INC., a Non-profit Florida Corporation, *Appellee*

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Appellee feels constrained to reply to appellant's motion to dismiss primarily because it would not want this Court to be misled by the following paragraph, found on page 3 of said motion to dismiss.

> "Good Samaritan challenged the sufficiency of the 'affirmative defense' by a motion to strike which was granted by the trial judge who, 'by way of dicta,' pointed out that 'the question sought to be raised . . . may be moot by reason of [Good Samaritan's] recent public declaration on the subject."

Appellant is sure that appellee does not mean this Court to infer that Good Samaritan is not now practicing racial segregation, or that its policy of racial

segregation has been done away with since the suit was filed. Out of an abundance of caution, however, appellant states to this Court that any such inference would be erroneous.

Even if appellee's policy had changed, however, the case would not be moot. The issue remains whether a state officer could at the time covered by the suit grant a tax exemption to an institution practicing racial segregation. Recognizing that this is the issue, appellant respectfully calls to the attention of the Court two additional cases not discussed in its jurisdictional statement, namely:

(1) *Reitman* v. *Mulkey,* 387 U.S. 369 (1967).

(2) *Commonwealth of Pennsylvania, et al.* v. *Brown et al.,* F 2d (3rd Cir.) decided March 7, 1968 and as yet unreported in the advance sheets.

In *Reitman* one of the prime considerations in finding an act to be unconstitutional was that it "significantly encourage[d] and involve[d] the State in private discriminations." [18 L. Ed. 2d at 838]. It is difficult to conceive of what would encourage appellee more to continue its policy of racial discrimination than the continuance of a very substantial tax exemption. It should be remembered too, it is respectfully submitted, that the involvement of the State in the instant case is twofold. The appellant tax assessor is an officer of the state who will be granting the exemption, albeit under compulsion. That compulsion, in turn, comes from the Supreme Court of Florida, thus bringing into this case the principles expounded in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

In *Pennsylvania* v. *Brown,* supra, Judge Van Dusen, in his concurring opinion, points out that in that case,

"The State action that continues today . . . is the 'encouragement' of discrimination . . ." (Pages 15 and 16 of the slip opinion). In the same case Judge Kalodner said in his concurring opinion:

> "Applying the principles [of Reitman v. Mulkey] to the instant case, I am of the opinion that the Orphans' Court 'significantly involved itself with invidious discriminations' when it removed the Board of Directors of City Trusts and appointed individual trustees of the Estate of Stephen Girard for the express purpose of effectuating the racial exclusionary clause in Girard's Will, and thereby brought itself within the ambit of the *Shelby* doctrine."

So, too, in the present case, where the highest court of Florida has ordered appellant to grant a tax exemption to an institution practicing racial segregation, the state is involved significantly and the federal issues raised are substantial indeed.

The very brief Motion to Dismiss filed by Appellee rests on two bases. The first is that the judgment of the Supreme Court of Florida rests on an adequate non-federal basis, namely, that appellant lacked standing to raise the constitutional issue framed by the stricken affirmative defense. State cases are cited by appellee to support this position of appellee. It is respectfully submitted that the cases cited by appellee are not controlling on the Supreme Court of the United States, which, after all, does have the final judicial responsibility to decide questions involving the United States Constitution. Appellant believes it is unconstitutional:

> (1) for the Courts of Florida to order him to grant a tax exemption to an institution practicing racial discrimination; and

(2) for him, as an officer of the state, to grant such a tax exemption, whether ordered to do so by the Court or not.

Appellee's argument that only a Negro has standing to raise these constitutional questions ignores the fact that it is appellant, a constitutional officer of the state, whose duty it is to grant or deny tax exemptions. It is he who seeks recourse from this Court so that *he* will not be under state compulsion to perform an unconstitutional act.

The second basis of appellee's motion to dismiss is that the appeal does not present a substantial federal question. Appellant tends to agree that the question presented has been long settled by principles enunciated in the decisions of this Court. The problem is that the Supreme Court of Florida decided the case contrary to established constitutional principles rather than in conformity with them. A substantial federal question is presented for that reason. In addition, the *precise* question presented by this appeal is both novel and important. Can a state subsidize an institution practicing racial segregation? The answer may be clear, but it is hardly unimportant or lacking in substance.

Respectfully submitted,

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